

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KATHLEEN M. WHALEN,

Plaintiff,

v.

JOHN G. MCMULLEN, individually and
not in his official capacity with the
Washington State Patrol,

PATRICIA LASHWAY, ACTING
SECRETARY, WASHINGTON
DEPARTMENT OF SOCIAL & HEALTH
SERVICES, in her official capacity,

Defendants.

Civil Action No. 2:15-cv-01625-BJR

ORDER GRANTING DEFENDANTS'
MOTIONS FOR SUMMARY
JUDGMENT AND DENYING
PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff Kathleen Whalen brings this action under 42 U.S.C. § 1983, alleging that Defendant John McMullen, an officer of the Washington State Patrol, violated the Fourth Amendment when he entered Plaintiff's home as part of a disability-fraud investigation. Plaintiff also brings suit against Patricia Lashway,¹ in her official capacity as acting secretary of the Washington Department of Social & Health Services (DSHS). Plaintiff asserts that DSHS, the

¹ Kevin Quigley was initially named as a Defendant to this lawsuit in his official capacity as secretary of DSHS. Dkt. 5, Pl.'s Compl. After Quigley resigned, Patricia Lashway was substituted in her official capacity. Dkt. 19.

1 agency that initiated the fraud investigation conducted by McMullen, is liable for McMullen's
2 allegedly unlawful conduct. Plaintiff also brings pendent state-law claims against McMullen,
3 alleging that he violated Article I, section 7 of the Washington state constitution and that he is
4 liable for trespass onto her property. Plaintiff moves for summary judgment on all claims.
5 Defendants have also moved for summary judgment.

6 Having reviewed the parties' briefing, the record of the case, as well as the relevant legal
7 authority, the Court will deny Plaintiff's Motion for Partial Summary Judgment [Dkt. #52]. The
8 Court will grant Defendants' motions for summary judgment [Dkt. #44, 50].
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10 **II. FACTUAL AND PROCEDURAL BACKGROUND**

11 John McMullen is a detective in the Criminal Investigative Division of the Washington
12 State Patrol. More specifically, McMullen is assigned to the Cooperative Disability
13 Investigations Unit ("CDIU"), which investigates potential fraud by recipients of Social Security
14 Disability ("SSD") benefits. DSHS's Disability Determination Services ("DDS") division refers
15 cases to the CDIU "to investigate allegations of fraud in SSA's disability programs for purposes
16 of criminal prosecution and/or civil/administrative action." Dkt. 53-1, Ex. 1 at 2. The CDIU is
17 overseen by the Office of the Inspector General ("OIG") of the United States Social Security
18 Administration ("SSA"). *Id.* at 2-3.
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20 A fraud case involving Plaintiff Kathleen Whalen was referred to the CDIU and assigned
21 to Detective McMullen on October 11, 2012. That same day, McMullen went to Plaintiff's
22 home to observe her physical function and mobility as part of his investigation into whether
23 Plaintiff was committing disability fraud. When McMullen arrived, he knocked on Plaintiff's
24 door. McMullen identified himself as an officer of the Washington State Patrol, but did not
25 disclose to Plaintiff that he was there as part of a disability-fraud investigation. Rather,

1 McMullen told Plaintiff that he was investigating a fictitious identity theft. McMullen was
2 wearing a badge around his neck. He also had a hidden camera.

3 McMullen and Plaintiff walked outside the home to McMullen's vehicle, where they
4 spoke at length. Plaintiff informed McMullen that she had been the victim of an identity theft,
5 about which she had pertinent information on her cell phone inside her home. The parties
6 dispute what happened next. McMullen asserts that Plaintiff "invited" him into her home, while
7 Plaintiff alleges that she walked into her home and McMullen "followed" her. Dkt. 47,
8 McMullen Decl. ¶ 16; Dkt. 52 at 5; Dkt. 53, Ex. 3, McMullen Dep. at 46: 11–25. The pair
9 continued their conversation inside the home. McMullen then left the premises.
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11 Plaintiff filed the instant suit against McMullen and DSHS under 42 U.S.C. § 1983,
12 alleging that McMullen's entry into her home and surreptitious videotaping inside violated the
13 Fourth Amendment's prohibition on unreasonable searches. Plaintiff also alleges that
14 McMullen's actions violated the Washington state constitution's prohibition on "home
15 invasions." Finally, Plaintiff brings a trespass claim against McMullen.
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17 **III. DISCUSSION**

18 **A. Summary judgment standard**

19 Summary judgment is proper "if the movant shows there is no genuine dispute as to any
20 material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).
21 The moving party bears the initial burden of demonstrating the absence of any material fact.
22 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "[T]he substantive law will identify which
23 facts are material. Only disputes over facts that might affect the outcome of the suit under the
24 governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty*
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1 *Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material fact is “genuine . . . if the
2 evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.*

3 **B. Plaintiff’s § 1983 claims**

4 Section 1983 is not a source of substantive rights; rather it provides “a method for
5 vindicating federal rights elsewhere conferred.” *Baker v. McCollan*, 443 U.S. 137, 144 n.3
6 (1979). Here, Plaintiff alleges that Defendants violated her Fourth Amendment right to be free
7 from unreasonable searches by subjecting her to a warrantless search under false pretenses.
8 Plaintiff moves for summary judgment on this Fourth Amendment claim, arguing that
9 McMullen’s conduct—namely, entering her home without a search warrant after misrepresenting
10 the nature of his investigation—was per se unreasonable. Plaintiff also moves for summary
11 judgment on her claims for equitable relief against DSHS, arguing that the agency is liable for
12 McMullen’s conduct because it initiated the fraud investigation. McMullen moves for summary
13 judgment, arguing that he is entitled to qualified immunity. DSHS also moves for summary
14 judgment and contends that Whalen does not have standing to pursue equitable relief against it.
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17 **1. McMullen is entitled to qualified immunity.**

18 “The doctrine of qualified immunity protects government officials ‘from liability for civil
19 damages insofar as their conduct does not violate clearly established statutory or constitutional
20 rights of which a reasonable person would have known.’” *Pearson v. Callahan*, 555 U.S. 223,
21 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Thus, the Court “must
22 determine whether: (1) the facts adduced constitute the violation of a constitutional right; and (2)
23 the constitutional right was clearly established at the time of the alleged violation.” *Mitchell v.*
24 *Washington*, 818 F.3d 436, 443 (9th Cir. 2016) (citing *Pearson*, 555 U.S. at 232). District courts
25 are “permitted to exercise their sound discretion in deciding which of the two prongs of the

1 qualified immunity analysis should be addressed first in light of the circumstances in the
2 particular case at hand.” *Pearson*, 555 U.S. at 236. Because the Court concludes that the law
3 did not “clearly proscribe[]” McMullen’s conduct at the time of the events giving rise to this suit,
4 it does not reach the question of whether McMullen’s conduct did, in the Court’s own judgment,
5 violate the Fourth Amendment. *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985).

6 Plaintiff contends that McMullen’s entry into her home violated the Fourth Amendment
7 because “such entry was acquired by affirmative or deliberate misrepresentation of the nature of
8 the government’s investigation.” *United States v. Little*, 753 F.2d 1420, 1438 (9th Cir. 1984).
9 But while it is true that McMullen affirmatively misrepresented his purpose for visiting Plaintiff,
10 the evidence presented by the parties does not demonstrate that McMullen utilized the ruse
11 specifically to secure entry into Plaintiff’s home. Rather, when McMullen arrived, he asked
12 Plaintiff to step outside and accompany him to his truck so that he could engage her in
13 conversation while simultaneously observing her physical activity. Dkt. 47, McMullen Decl. at
14 4 ¶ 13–14; Dkt. 52 at 5. Plaintiff never alleges that McMullen claimed to need access to her
15 home for his fictitious investigation. This differs significantly from the cases that Plaintiff cites
16 in support of her argument—namely, *United States v. Bosse*, 898 F.2d 113, 115 (1990).

17 In *Bosse*, an agent from the federal Bureau of Alcohol, Tobacco, and Firearms (ATF),
18 escorted a state agent to the home of a firearms dealer whose state application for a license to sell
19 weapons was pending. *Id.* at 114. The state agent truthfully told the dealer that he was there to
20 inspect the home as part of the license-application process, and the dealer accordingly granted
21 both agents access to his home. *Id.* However, the ATF agent did not disclose that he
22 accompanied the state agent in his capacity as a federal agent “observ[ing] things of interest to
23 ATF and the federal government.” *Id.* The *Bosse* court held that the ATF agent’s entry into the
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1 dealer's home constituted an unreasonable search because "a ruse entry when the suspect is
2 informed that the person seeking entry is a government agent but is misinformed as to the
3 purpose for which the agent seeks entry cannot be justified by consent." *Id.* at 115 (citing *United*
4 *States v. Phillips*, 497 F.2d 1131, 1135 n.4 (9th Cir. 1974)).

5 In contrast to the federal agent in *Bosse*, McMullen did not engineer his ruse to coerce
6 entry into Plaintiff's home. McMullen did not need to enter Plaintiff's home to gather
7 information for his disability-fraud investigation; all he needed was to get Plaintiff to perform
8 physical tasks so that he could observe her bodily movements—and he did so outside of
9 Plaintiff's home. Dkt. 47, McMullen Decl. ¶ 16. After Plaintiff indicated that she had
10 information she believed to be pertinent to the identity-theft investigation, the conversation
11 appears to have flowed into Plaintiff's home without any explicit request by McMullen to enter
12 the home as part of his investigation. Plaintiff has not presented the Court with any authority
13 requiring McMullen to retreat from her home under these circumstances or clearly proscribing
14 McMullen's conduct in this situation. Qualified immunity "provides ample protection to all but
15 the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S.
16 335, 341 (1986). Finding that McMullen is not exceptional in either of these respects, the Court
17 concludes that he is entitled to qualified immunity. McMullen's motion for summary judgment
18 is granted.
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21 **2. Plaintiff does not have standing to pursue equitable relief against DSHS.**

22 Plaintiff seeks declaratory and injunctive relief in the form of an order enjoining DSHS
23 from allowing CDIU officers to utilize a ruse to gain access to her home. Plaintiff's request for
24 relief presupposes, of course, that McMullen's warrantless entry into her home violated the
25 Constitution, an issue that the Court has not reached in the above qualified-immunity analysis.

1 The Court need not reach that issue here either, as Plaintiff cannot meet “the irreducible
2 constitutional minimum of standing” necessary to pursue the equitable relief she seeks. *Lujan v.*
3 *Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

4 In the context of equitable relief, alleged past wrongs “do not in and of themselves
5 amount to that real and immediate threat of injury necessary to make out a case or controversy.”
6 *Id.* at 103. Instead, Plaintiff must “show that [s]he has sustained or is immediately in danger of
7 sustaining some direct injury as a result of the challenged official conduct and the injury or threat
8 of injury must be both real and immediate, not conjectural or hypothetical.” *City of Los Angeles*
9 *v. Lyons*, 461 U.S. 95, 102 (1983) (internal citations omitted). Plaintiff alleges that she may be
10 exposed to repeated injury—warrantless entry into her home—as long as she continues receiving
11 SSD benefits because there is no injunction preventing it. Dkt. 52 at 19–20. Such a tautological
12 statement cannot itself suffice to demonstrate a real and immediate threat. Further, DSHS
13 presents evidence that a determination has already been made that Plaintiff has not engaged in
14 fraud, which reduces any credible threat that Plaintiff will again be subject to investigation, much
15 less a ruse-entry into her home. Dkt. 68 at 10; Dkt. 51-2, French Dep. at 43:1–9.

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18 **3. Plaintiff has not established a policy or custom of investigative ruses.**

19 In order to demonstrate that DSHS is liable for McMullen’s conduct, Plaintiff must show
20 that “there is a direct causal link between a [state] policy or custom” and McMullen’s use of a
21 ruse in investigating Plaintiff for fraud. *City of Canton v. Harris*, 489 U.S. 378, 385 (1989).
22 DSHS argues that it is impossible for Plaintiff to prove that the agency had *any* policies
23 regarding the investigative techniques employed by the CDIU, much less that it maintained any
24 policies regarding the specific investigative technique at issue in this case. Indeed, Plaintiff does
25 not offer any evidence tending to show that DSHS has promulgated policies governing the actual

1 investigative activities of the CDIU. Rather, Plaintiff argues that, because DSHS is a “partner”
2 in a multi-agency agreement giving rise to the CDIU, that it is responsible for all activities
3 undertaken by the Unit. But this agreement—the Memorandum of Understanding (MOU)—
4 dictates that investigations are to be overseen by a federal agent from the SSA Office of the
5 Inspector General, not by any policymaker at DSHS. In fact, the MOU explicitly states that this
6 federal agent “will be the CDI Unit’s final decision-making authority regarding day-to-day CDI
7 Unit operations, subject to OIG management oversight.” Dkt. 53, Ex. 1 at 4. DSHS is not
8 mentioned as a policy-making authority with respect to the investigations conducted by CDIU.
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10 Finally, Plaintiff argues that while DSHS may not maintain any explicit investigative
11 policies, it nonetheless “ratified” McMullen’s conduct by failing to correct it. In order to prove
12 ratification, Plaintiff would need to demonstrate that “an official with final policy-making
13 authority ratified a subordinate’s unconstitutional decision or action and the basis for it.” *Gillette*
14 *v. Delmore*, 979 F.2d 1342, 1346–47 (9th Cir. 1992) (citing *City of St. Louis v. Praprotnik*, 485
15 U.S. 112, 123–24 (1988)). A finding that a state actor ratified the conduct of a subordinate
16 would only be appropriate if it is evident that “a deliberate choice to follow a course of action
17 [wa]s made from among various alternatives by the official or officials responsible for
18 establishing final policy with respect to the subject matter in question.” *Id.* at 1347 (quoting
19 *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986)). Plaintiff has not produced any
20 evidence that any person within DSHS made an affirmative choice ratifying McMullen’s conduct
21 or even that any person within DSHS *has* the policymaking authority to do so. Indeed the MOU
22 explicitly indicates that McMullen’s investigative activities are overseen by an SSA special agent
23 and not by any DSHS official.
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1 The Court therefore agrees with DSHS that Plaintiff has not shown that she is facing an
2 appreciable risk of future injury. Thus, Plaintiff cannot satisfy the irreducible minimum of
3 standing with respect to her claim against DSHS. The Court therefore denies Plaintiff's motion
4 for summary judgment on her § 1983 claim against DSHS and grants Defendant Lashway's
5 motion as to the same.

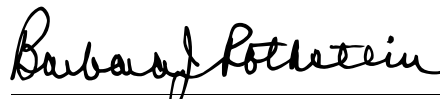
6 **C. Plaintiff's state-law claims**

7 Having disposed of Plaintiff's § 1983 claims, the Court declines to exercise supplemental
8 jurisdiction over Plaintiff's state-constitutional and trespass claims. *See United Mine Workers of*
9 *America v. Gibbs*, 383 U.S. 715, 726 (1966) ("Certainly, if the federal claims are dismissed
10 before trial . . . the state claims should be dismissed as well."); *Acri v. Varian Assocs., Inc.*, 114
11 F.3d 999, 1000 (9th Cir. 1997) (reiterating that state law claims should be dismissed if federal
12 claims are dismissed before trial).
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14 **IV. CONCLUSION**

15 Plaintiff's Motion for Partial Summary Judgment [Dkt. # 52] is DENIED. Defendant
16 McMullen's Motion for Summary Judgment [Dkt. #44] is GRANTED. Defendant Lashway's
17 Motion for Summary Judgment [Dkt. #50] is also GRANTED. This matter is hereby
18 DISMISSED.
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21 Dated this 27th day of February, 2017.
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24 Barbara Jacobs Rothstein
25 U.S. District Court Judge